



## STATE BOARD OF ELECTIONS

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July 21, 2008

**VIA Electronic Mail & U.S. Mail**

Commissioner Rosemary Rodriguez, Chair  
State Plan Guidelines Comments  
U.S. Election Assistance Commission  
1225 New York Ave., NW, Suite 1100  
Washington, D.C. 20005

Re: ***Proposed Guidelines of HAVA Section 254(a)(11): Material Changes in the Administration of HAVA State Plans***

Dear Commissioner Rodriguez:

On behalf of the Kentucky State Board of Elections, I would like to submit a comment on the proposed Guidelines of HAVA Section 254(a)(11): Material Changes in the Administration of HAVA State Plans (Proposed Guidelines), discussed at the June 19, 2008 meeting of the Election Assistance Commission (EAC). It is my understanding that this matter is currently open for public comment until 4 p.m. on August 11, 2008, and any comments received by the EAC will be relayed to the Commissioners at the July 21, 2008 meeting.

During the June 19 meeting, Commissioner Hunter voiced concern over sections (3), (4) and (5) of the Proposed Guidelines due in primary part to the drafters reliance on 41 CFR 105.71.130. Kentucky agrees with Commissioner Hunter's assessment and provides the following comment:

41 CFR 105-71 (aka the Common Rule) should not be applied in the administration of HAVA because HAVA's statutory language is in contrast to the language of the Common Rule. The EAC was not created by HAVA to be an agency with the function of "approving" State Plans as contemplated by the Common Rule. Rather, the EAC's duties as it relates to State Plans are to publish each State Plan according to Sec. 255(b) and carry out duties relating to election assistance in providing information and training on the management of payments and grants according to Sec. 202(4).

Section 105-71-103(a) states that

Section 105-71.100 through 105-71.152 of this subpart apply to all grants and subgrants to governments, except where *inconsistent* with Federal statutes or with regulations authorized in accordance with the exception provision of 105-71.105. (emphasis added)

The provisions of the Common Rule apply to grants and subgrants listed in Section 103 or grants or subgrants, which have enabling statutes that are consistent with the provisions of the Common Rule. Further, federal awarding agencies that have the authority to approve or disapprove of a State's plan for implementation of the grant or subgrant may use the provisions of the Common Rule to regulate such State Plans.

Sec. 105-71.102 defines "prior approval" to mean "documentation evidencing consent prior to incurring specific costs." The language in the Proposed Guidelines lifts heavily from the language in Sections 105-71.111 and 105-71.130 of the Common Rule. Section 105-71.130 repeatedly refers to the notion of "prior approval" before a state may make budgetary changes or programmatic changes to the State's proposed use of a federal grant. HAVA, however, invests no such authority in the EAC to provide prior approval to a State's use of HAVA funds. As such, sections (3), (4) and (5) of the Proposed Guidelines are outside of the EAC's authority to levy upon the states.

As to the Proposed Guidelines' sections (1) and (2), these guidelines are superfluous. HAVA Sections 253 and 254 provide specific guidance for the implementation of a State Plan. Any congressional revision to Sections 253 and 254 would necessarily require each state to amend their State Plans without unnecessary guidance from the EAC. The same argument holds true for a new or revised State law, organization, or policy affecting HAVA implementation—if such a change occurs, it is unnecessary for the EAC to dictate that a state's Plan be revised. Section 253(c) expressly states

the specific choices on the methods of complying with the elements of a State plan *shall be left to the discretion of the State*. (emphasis added).

In no event does HAVA allow the EAC to provide "prior approval" for a State's implementation of HAVA nor does it provide that the EAC can provide such mandatory guidance as is contemplated in the Proposed Guidelines.

The Kentucky State Board of Elections contends that the Proposed Guidelines are outside of the authority given by HAVA to the EAC. Kentucky strongly urges the Board members to vote against the Proposed Guidelines or to remove the draft from consideration.

Kentucky further requests that should the EAC vote on the Proposed Guidelines that it do so at an open public meeting of the Agency in accordance with the provisions of the Sunshine Act.

Kentucky State Board of Elections  
July 21, 2008

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Thank you for allowing the public the opportunity of providing comments on this matter.  
Please contact me if you have any questions or concerns about my comments provided.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah B. Johnson". The signature is fluid and cursive, with the first name "Sarah" and last name "Johnson" clearly distinguishable.

Sarah Ball Johnson  
Executive Director